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No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAYNE BRAY, OPERATION RESCUE, *et al.*,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS ON REARGUMENT AND BRIEF FOR RESPONDENTS ON REARGUMENT

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MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS ON REARGUMENT

Respondents respectfully move this Court for leave to file the attached Brief for Respondents on Reargument. On June 8, 1992, this Court restored this case to the calendar. 119 L. Ed. 2d 561 (1992). Because of the potential significance of the recent decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), to the issues in this case; because of the potential significance of questions raised at oral argument by several members of this Court regarding the second clause of 42 U.S.C. § 1985(3), the hindrance

clause, Tr. of Oral Arg. 9, 11-12, 22-23, 25, 27, and the availability of injunctive relief for violations of § 1985(3), Tr. of Oral Arg. 47; and because the briefs submitted prior to the argument had not addressed those questions, it would assist the Court and prejudice no one to consider this Brief for Respondents on Reargument. Accordingly, Respondents respectfully move this Court, pursuant to Rule 25.6, for permission to file the attached Brief.

Respectfully submitted,

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Date: August 14, 1992

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SUMMARY OF ARGUMENT

Respondents submit this supplemental brief in connection with the reargument of this case in order to apply the Court's decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), to the legal issues raised in this case and to address questions raised during oral argument that were not addressed in the parties' original briefs.

ARGUMENT

Introduction

In the aftermath of the Civil War, Congress was confronted by lawless mobs seeking to prevent Blacks from exercising a wide range of political and economic rights. In 1871, Congress enacted the Ku Klux Klan Act ("the Act"), including the portion which is currently codified at 42 U.S.C. § 1985(3), to assist state and local authorities in restoring the rule of law to protect newly freed slaves and their supporters from mob violence. As the text of § 1985(3) indicates, Congress intended this section of the Act to afford federal protection against mob rule that would parallel and reinforce the limits on state power codified in the Reconstruction Amendments. *See generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952). In 1992, this Court is confronted by lawless mobs seeking to prevent women from choosing whether to have an abortion. The plain language of the Act vests federal courts with the power and the duty to assist state and local authorities in preserving the equal enjoyment of the rule of law.

I. *PLANNED PARENTHOOD v. CASEY* SUPPORTS RESPONDENTS' ARGUMENT THAT A CONSPIRACY INTENDED TO DENY WOMEN CONSTITUTIONAL RIGHTS MEETS THE CLASS-BASED ANIMUS REQUIREMENT OF § 1985(3).

In *Planned Parenthood v. Casey*, this Court affirmed a woman's right to terminate her pregnancy. 112 S.Ct. 2791 (1992). As the Joint Opinion explained, "[t]he woman's right to terminate her pregnancy before viability is . . . a component of liberty we cannot renounce." *Id.* at 2817. This recent decision provides additional support for respondents' argument that women are a class within the meaning of § 1985(3) and that Operation Rescue acts with discriminatory animus when it blocks women from obtaining abortions. Resp. Br. 16-35.

Casey demonstrates once again why women are a protected class under § 1985(3). Women's reproductive capacity has long served as the rationale to deny women equal opportunities in the workforce and the political process. *See Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding exclusion of women from jury duty due to women's "special responsibilities" as the "center of home and family life"); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (upholding law restricting hours women could work, reasoning that, "[because] healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest"); *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring) (upholding prohibition on women practicing law because "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"). In *Casey*, this Court recognized that "[t]hese views . . . are no longer consistent with our understanding of the family, the individual, or the Constitution." 112 S.Ct. at 2831.

Indeed, the Constitution commands that control of reproductive capacity is essential in order for women to control their destiny:

> [T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 112 S.Ct. at 2807.

Casey also confirms that mob violence intended to prevent women from exercising a right guaranteed to them by the Constitution evinces a class-based animus against women. *See* Resp. Br. 24-35. In *Casey*, the Court recognized that a woman's right to control her own body is a protected liberty interest in part because such control is vital if women are "to participate equally in the economic and social life of the Nation." 112 S.Ct. at 2809; *see also id.* at 2846 (Blackmun, J., concurring) ("restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality"). When, as here, a mob knowingly engages in unlawful activity designed to prevent the exercise of the right to control one's body, it strikes at the heart of the effort to make women truly "equal." Unlike the usual § 1985(3) case where a right available to all is selectively denied to a few because of their characteristics, this case involves a right

that is uniquely available to the members of the victim group because of, and as a counter-weight to, the very characteristic that renders the victim group vulnerable to being treated unequally in the first place.[1] Operation Rescue's conspiracy is an exercise in class-based animus because it is intended to perpetuate, by force rather than law, the unequal status of women that *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey* sought to ameliorate. *See International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (discrimination against women of childbearing capacity is discrimination against women).[2]

II. OPERATION RESCUE ACTS "FOR THE PURPOSE OF PREVENTING OR HINDERING" LAW ENFORCEMENT AUTHORITIES FROM SECURING TO WOMEN EQUAL PROTECTION OF THE LAWS AND THUS VIOLATES THE HINDRANCE CLAUSE OF § 1985(3).

Two clauses of § 1985(3) apply on the record in this case. The arguments have thus far concentrated on the first clause of § 1985(3), the deprivation clause, rather than the

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[1] The fact that not all women would have standing to challenge a particular restriction, *see* Tr. of Oral Arg. 37-39, does not change the fact that the targeted class consists of all women. The question of standing is distinct from the nature of the class affected and the discriminatory animus directed at that class. If the Ku Klux Klan blockaded the entrance to an integrated school, only students who were registered at that school would have standing to challenge the blockade, despite the fact that the class to whom the animus is directed is more broadly defined as Blacks and their champions.

[2] *Casey*, like *Johnson Controls*, addressed burdens imposed on women, and thus is distinct from *Geduldig v. Aiello*, 417 U.S. 484 (1974), which dealt only with benefits to pregnant employees. *See* Resp. Br. 26-27.

second clause of § 1985(3), the hindrance clause, which prohibits the hindrance of local authorities:

> If two or more persons in any State or Territory conspire . . . for the purpose of *preventing or hindering the constituted authorities* of any State or Territory from giving or securing to all the persons within such State or Territory the equal protection of the laws . . . [any person injured thereby shall have a cause of action].

42 U.S.C. § 1985(3) (emphasis added).

Like the deprivation clause, the hindrance clause provides a cause of action when private conspiracies interfere with the exercise of protected rights. However, as discussed at oral argument, the hindrance clause operates distinctly from the deprivation clause. Tr. of Oral Arg. 9-11, 12, 22-23, 25, 27. *See also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring); *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971) ("As for interference with state officials, § 1985(3) itself contains another clause dealing explicitly with that situation") (emphasis added); *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956) (relying on the hindrance clause to enjoin anti-desegregationist demonstrators from obstructing school officials' efforts to implement *Brown v. Board of Education of Topeka); see generally* Br. for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae ("NAACP LDEF Br."). Like the mob violence by the Ku Klux Klan that gave rise to the Act, the strategy of Operation Rescue is to hinder state and local officials from safeguarding a protected class's

enjoyment of their state and federal rights.[3] Operation Rescue's mob violence thus falls squarely within the coverage of § 1985(3)'s hindrance clause.[4]

Congress intended the hindrance clause to provide a means of federal relief from organized mobs that overwhelm local law enforcement authorities and disable them from securing the equal protection of the laws. *See, e.g.*, Cong. Globe, 42nd Cong., 1st Sess. 514 (1871) (Rep. Poland) (it is an offense if "somebody undertakes to step in and clog justice by preventing the State authorities from carrying out [the equal protection of the laws]"); *id.* at App. 315 (Rep. Burchard) (stating that hindrance of state's ability to secure equality of protection violates the statute).

Plaintiffs do not need to show that the state participated in the conspiracy in any way or agreed with its ultimate goals. *Griffin*, 403 U.S. at 98-99; *cf. Novotny*, 442 U.S. at 384 (Stevens, J., concurring) ("if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment . . . the private persons would then have violated

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[3] The existence of invidious discriminatory class-based animus has been shown in preceding deprivation clause arguments. *See* Resp. Br. 31-35 *supra* Point I. In any event, this Court has never held that the hindrance clause requires such animus. *See Kush v. Rutledge*, 460 U.S. 719, 725-26 (1983); NAACP LDEF Br. 27-33.

[4] Respondents produced ample evidence at the district court hearing demonstrating that petitioners' activities constitute a violation of the hindrance clause. *See* 726 F.Supp. 1483, 1489 n.4 (Pet. App. 22a-23a n.4); *see also* Resp. Br. 10-12. In accordance with Fed. R. Civ. P. 15(b), the issue was tried and thus is to be treated in all respects as if it had been raised in the pleadings. *See Brandon v. Holt*, 469 U.S. 464 (1985).

§ 1985(3)"). As the legislative history indicates, "[w]hether [the state's] failure is willful or the result of inability can make no difference." Cong. Globe, 42d Cong., 1st Sess. App. 251 (1871) (Sen. Morton). In order to remedy constitutional rights guaranteed against state infringement, such as the right to abortion, plaintiffs need demonstrate only that "the aim of the conspiracy is to influence the activity of the State" or "that the state was somehow . . . affected by the conspiracy." *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 830, 833 (1983) (discussing deprivation clause).

Here, an essential element of Operation Rescue's conspiracy is to impede state authorities from enforcing the federal right to which it objects. As the record shows, Operation Rescue purposefully pursues tactics such as keeping secret which clinics will be targeted, physically blocking all entrances and exits, defacing clinic property, strewing nails on parking lots and public streets, and overwhelming local police by the large number of arrests that need to be made to restore order, all of which hinder state and local authorities from affording the respondents equal protection of the laws. *See, e.g.*, 726 F. Supp. 1483, 1489-90 (Pet. App. 22a-23a); Br. of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae 6, 9-12 (describing Operation Rescue pamphlets). Indeed, the City of Falls Church has filed an amicus curiae brief in this case reaffirming its inability to guarantee women access to health care facilities that provide abortion and related services in the face of Operation Rescue blockades. Br. for Falls Church, Virginia as Amicus Curiae 5-12. Repeatedly faced with petitioners' unannounced, overwhelming demonstrations, local municipalities are unable to fulfill their duties without reinforcement, and even then are unable to prevent clinic closings and the attendant harm to the physical and

psychological well-being of the women patients. *Id.; see* Resp. Br. 10-12.

The record thus contains an ample evidentiary basis for reliance on the hindrance clause to affirm the federal injunction. This Court should give effect to Congress's expressed intent to provide a remedy when an organized mob overwhelms law enforcement authorities and prevents them from protecting the individual rights of a protected class.[5]

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[5] In addition, the deprivation clause of § 1985(3) may be violated if a conspiracy prevents members of a protected class from enjoying state laws prohibiting force and intimidation, and thereby interferes with that class's exercise of a federal constitutional right. *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (Easterbrook, J.). Unlike 42 U.S.C. § 1983 which explicitly confines its reach to "rights, privileges or immunities secured by the constitution and laws," § 1985(3) speaks in terms of securing the "*equal protection of the laws*," a statutory phrase which includes the protections of state law. *See Briscoe v. LaHue*, 460 U.S. 325, 337-38 (1983); *Griffin*, 403 U.S. at 103. Congressional debate confirms this plain reading of the text. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 567 (1871) (statement of Sen. Edmunds indicating that state law violation, *e.g.* murder, combined with requisite class-based animus, was intended to fall within scope of statute). *See also* Ken Gormley, *Private Conspiracies and the Constitution*, 64 Tex. L. Rev. 527, 587 (1985) (concluding that "equal protection of the laws" includes state laws); Janis L. McDonald, *Starting From Scratch: A Revisionist View of 42 U.S.C. § 1985(3) And Class-Based Animus*, 19 Conn. L. Rev. 471, 484 n.50 & 51 (1987) (discussing legislative history of § 1985(3)).

This Court has yet to decide this issue, *see Carpenters*, 463 U.S. at 833-34, while lower courts have reached differing conclusions. *See Stevens v. Tillman*, 855 F.2d at 404; *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 587-89 (2d Cir. 1988) (discussing cases).

III. FEDERAL COURTS HAVE AUTHORITY TO GRANT INJUNCTIVE RELIEF FOR VIOLATIONS OF § 1985(3).

One member of this Court questioned whether injunctive relief is available for violations of § 1985(3), Tr. of Oral Arg. 47; *see* Br. for the United States as Amicus Curiae 7-8 n.8. Jurisdiction to grant equitable relief under § 1985(3) is provided by 28 U.S.C. § 1343(4), which explicitly authorizes injunctive relief in any case involving "civil rights." Section 1343(4) was enacted by Congress in 1957 to reinforce the remedial aspects of § 1985(3).[6] *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 610 (1979) (discussing legislative history). Moreover, even before the enactment of § 1343(4), courts ordered injunctive relief in § 1985(3) cases pursuant to their general powers of equitable relief under the All Writs Act, 28 U.S.C. § 1651. *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 103 (8th Cir. 1956) (enjoining conspiracy against school integration) (citing cases in support of equitable relief).

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[6] In 1874, in connection with the enactment of the Revised Statutes of the United States, the remedial and jurisdictional segments of the 1871 Act were separated. Although this portion of the remedial section is codified at 42 U.S.C. § 1985(3), the original jurisdictional provision, as amended in 1911, is codified at 28 U.S.C. § 1343.

CONCLUSION

For the foregoing reasons, and for the reasons provided in Respondents' Brief dated May 13, 1991, the decision of the United States Court of Appeals for the Fourth Circuit herein should be affirmed.

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